DO ALL ROADS LEAD TO ISLAMIC RADICALISM? A COMPARISON OF ISLAMIC LAWS IN INDIA AND NIGERIA

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TABLE OF CONTENTS

I. INTRODUCTION .............................................. 780

II. BACKGROUND SUMMARY .................................. 785
   A. Sources of Islamic Law ................................ 785
   B. Nigerian Legal History ................................ 787
   C. Indian Legal History .................................. 792
   D. Domestic Climate of India and Nigeria ............... 796

III. ANALYSIS .................................................. 800
   A. Comparison of India and Nigeria in Their
      Application of Islamic Laws ............................ 800
   B. Alternatives to Extending Shari’a in Nigeria .......... 806

IV. CONCLUSION ............................................... 810

I. INTRODUCTION

While Muslims live in countries around the world, only a small minority have resorted to terrorism and violence aimed at harming those with whom they disagree. The events of 9/11 vividly demonstrated that the religious dogma of a few can impact a great number of people. Like nothing else before, 9/11 showed the world what can happen when a few individuals choose to use religion as an unfounded rationale to inflict destruction and harm on innocent people.

As a consequence, it is necessary now more than ever to better monitor the legal, political, and social workings of countries thought to be incubators of terrorism, beyond those of the Middle East, focusing on the impact those dynamics are having on the different segments of their populations, in this post-9/11 era. Some view the imposition of certain types of laws as a threat to the peaceful existence of countries.¹ For example, when the Taliban established Shari’a, or Islamic law, in Afghanistan, it was an indication of their approval of al Qaeda and its activities.² However, the adoption, retention, expansion, reform, or non-adoption of these laws might equally serve as an index of radical Islamism.³ Thus, seeing what type of laws a country adopts and implements may indicate not only the legal but also the political course it will follow.

Outside of the Arab world, many countries of Africa have adopted Islamic law. In recent years Africa has been the site of several radical Islamic terrorist

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² See generally JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 224 (3d ed. 1998) (noting the Taliban forced women to wear veils, prevented women from working, barred girls from attending school, and imposed harsh punishments, including the stoning of adulterers) [hereinafter THE STRAIGHT PATH].

³ JOHN L. ESPOSITO, WOMEN IN MUSLIM EDITORIAL, FAMILY LAW xiv (2d ed. 2001); see Paul Marshall, Radical Islam’s Move on Africa, WASH. POST, Oct. 16, 2003, at A25 (noting the movement for expansion of Shari’a in Kenya and a Muslim leader’s threat to break away if Shari’a is not allowed to expand) [hereinafter Radical Islam’s Move]; see also Mark Bixler & Sheila M. Poole, New Hope for Afghanistan; Atlantans Celebrate Adoption of Constitution, ATLANTA J.-CONST., Jan. 7, 2004, at F6 (emphasizing Afghanistan’s new constitution does not call for Shari’a); Charles Clover & Nicholas Pelham, Iraqi Plan for Sharia Law ‘A Sop to Clerics’, Say Women, FIN. TIMES, Jan. 15, 2004, at 11 (discussing the possible role of Shari’a in Iraq’s new constitution). The new constitution may impose Shari’a while the civil code under Saddam Hussein disallowed marriage below the age of eighteen, arbitrary divorce, and male favoritism in child custody. Pamela Constable, Iraqi Women Decry Move to Cut Rights; Council Would Place Matters of Family Under Islamic Law, WASH. POST, Jan. 16, 2004, at A12.
attacks. The continent provides fertile ground for terrorism and terrorists due to its countries' poor economies, porous borders, weak law enforcement, and lax judicial institutions. Islam is an established and fast-growing religion in the countries of Africa, such as Nigeria, where poor, young, unhealthy, and undereducated populations often put no faith in their governments and seek alternative institutions to provide services to meet their needs. India also has adopted Islamic law. It has been another site for radical Islamic terrorism, especially in Jammu and Kashmir. It is a developing country with a significant Muslim population. Like Nigeria, India contains a Muslim population which could provide willing recruits to terrorist organizations.

The legal, political, and social dynamics of countries such as Nigeria and India need a closer examination. Understanding these dynamics may lead to a determination of the ways and means of how to thwart the growth and rise of radical and violent Islam. It is important to examine countries' use of different means to deal with the interaction of law, government, and religion. Countries with Muslim populations have chosen to take different approaches in applying their laws to their Muslim citizens.

Approaches may vary for a number of reasons. For instance, Islam is by no means a monolithic religion, as it is split into two main branches, Shi'a and Sunni, with additional minor groups. Most Muslims are Sunni, with four schools of thought: Hanafi, Maliki, Hanbali and Shafi'i. There may be significant differences among these schools. In India, the majority of

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5 Rice, supra note 4.
6 Id.
8 ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 61-62 (discussing Egypt's uses of reformed versions of Shari'a); id. at 111 (discussing India's use of Islamic law as the basis of marriage and divorce law if the Muslim couple chooses to use each); Marshall, supra note 1 (noting twelve of thirty-two states in Nigeria use Shari'a as the basis for their personal and criminal laws); see also Clover & Pelham, supra note 3 (discussing Iraqi women's concern about the possibility of introducing Shari'a into the new Iraqi constitution); Bixler & Poole, supra note 3 (describing the nonadoption of Shari'a in Afghanistan's constitution).
9 ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 2.
10 Id.
11 Bharathi Anandhi Venkatraman, Comment, Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a
Muslims are Sunni and follow the Hanafi school. In Nigeria, the majority of Muslims are Sunni and follow the Maliki School. Even within these groups and schools, there may be regional differences.

Shari'a, or Islamic law, is the "straight path" for a Muslim society to follow and many countries codify it in their civil code or apply it to personal law issues, such as marriage, divorce, and succession. According to Islamic tradition, Shari'a originates from a divine source and is a comprehensive legal system whose laws govern an individual's duties to God and duties to others. Personal laws, including family law, have been one of the central components of Shari'a. Although Western-influenced legal codes may have replaced Islamic law in many countries with large Muslim communities in most cases, Muslim personal law continues to function separately from other areas of the law.

Relying on Shari'a is significant because many intellectuals and religious scholars in the Muslim community believe that the ideas of democracy and secularism are contradictory to Islamic law and cannot exist simultaneously. In addition, Islamic fundamentalists who promote Muslim domination of and antagonism towards non-Muslims also find validation for their position in religion, specifically in religious texts. For primarily religious reasons, the leaders of the Muslim communities prefer to apply Shari'a to all Muslims within their respective countries or regions.

One problem with having Islamic law as the basis of personal and criminal laws for Muslims is that non-Muslims in a country may have qualms about having a different set of personal and criminal laws apply to them. This creates undercurrents of dissatisfaction within a society where non-Muslims

—and the Convention Compatible?, 44 AM. U. L. REV. 1949, 1970 (1995) (stating that the Hanafi school recognizes that women have very narrow grounds for court dissolution of a marriage while the Maliki school allows divorce under broader grounds).

12 Id.
13 Id. at 2.
14 Id. at 2.
15 THE STRAIGHT PATH, supra note 2, at 78. "The literal meaning of Sharia is 'the road to the watering hole,' the clear, right, or straight path to be followed." Id.
16 Id. at 130.
17 Id. at 12.
18 Id. at 11.
19 See THE STRAIGHT PATH, supra note 2, at 159.
21 See WOMEN IN MUSLIM LAW, supra note 3.
feel Muslims are receiving privileged treatment since they do not have a country's civil and criminal codes applied to them.\textsuperscript{22}

Beyond these sentiments, Shari'a does in fact affect non-Muslims. For example, in Nigeria, despite claims that Shari'a has no impact on non-Muslims, there are some signs that Shari'a institutionalizes and sanctions discrimination along religious lines, and some seek to impose Islamic value systems and legal codes on non-Muslims.\textsuperscript{23} For example, the governor of the state of Zamfara stated that non-Muslims would not be awarded government contracts.\textsuperscript{24} This demonstrates that some Muslim leaders are not promoting peaceful co-existence between Muslims and non-Muslims in northern Nigeria by instituting Shari'a.\textsuperscript{25} Thus, extending Shari'a to criminal conduct may have a detrimental effect on non-Muslims in countries such as Nigeria, contrary to the claims of those who support imposing it.

In addition to expanding Islamic law, other actions may have unwelcome consequences. For instance, removing Islamic-based laws currently in place may also lead to problems for the government, especially if the government seeks to be in the good graces of the Muslim community and its leaders. However, the government may also use Islam as a means to legitimize its policies and control over a country, and counter-government forces might use it to attempt to topple what they view as non-Islamic governments.

Examining these various approaches and dynamics is particularly important in the post-9/11 era. The choices countries employ to keep, expand, reform, or remove Islamic laws are crucial not only for the Muslims within a country's borders but also for other communities within the country and for the general international community. The choices may determine if a country will remain peaceful and if communities will live in harmony with one another.\textsuperscript{26}

This Note will focus on two countries and their Shari'a laws. India and Nigeria, with a total of close to two hundred million Muslims, provide a good perspective on the issues that arise when countries choose to use laws based solely on religion. India and Nigeria, both former British colonies, also are ostensibly secular countries, as their constitutions do not establish or recognize

\textsuperscript{22} See Marshall, \textit{supra} note 1; Sumit Ganguly, \textit{The Crisis of Indian Secularism}, J. \textit{DEMOCRACY}, Oct. 2003, at 14 (arguing that the not reforming Muslim personal law plays "into the hands of Hindu zealots and political activists who could disingenuously argue that the officially secular state was actually a scheme pandering to minorities").

\textsuperscript{23} \textit{THE STRAIGHT PATH}, \textit{supra} note 2, at 202.

\textsuperscript{24} Id.

\textsuperscript{25} Id.

\textsuperscript{26} Id.
a state religion. Nigeria and India also provide an environment potentially ripe for breeding Islamic terrorists. Both countries are host to communities of poor, disillusioned Muslims whom anti-Western fundamentalist Islamic terrorist organizations might recruit and exploit.27

Since their independence from Britain, both India and Nigeria have had Shari'a as the basis of personal status laws for Muslims, but parts of Nigeria are now expanding that law from covering only personal status issues to covering criminal conduct as well. This expansion has played a significant role in formenting sectarian violence that has killed nearly three thousand people.28 In November 2002, riots erupted between Muslims and Christians, sparked by an editorial about Islam and the Miss World Pageant, and more than two hundred people were reported dead from the violence.29 While not determinative, the violence indicates that Nigeria could follow the path of Sudan, where similar religious differences have led to an ongoing twenty-year civil war.30

Unlike Nigeria, violence has not erupted between religious groups in India over the continued existence of Islamic law. Nigeria may be able to draw from India's experience by limiting Islamic law to personal status issues and not extending it to criminal conduct. India has also felt pressure from its Islamic community to retain Islamic law when there have been contradictory outcomes between the Indian Supreme Court and Muslim personal status courts.31 Nigeria might benefit from examining India's response to the pressure.

This Note will examine the history and implementation of Islamic law in India and Nigeria, specifically focusing on Islamic laws relating to marriage, divorce, and criminal conduct. This examination will note the differences between the two countries and the roles of their judiciaries and governments, and it will survey the legal and political issues in keeping, expanding, reforming, or removing Islamic laws. For example, Shari'a has not been expanded to criminal actions in India while it has in northern Nigeria. The Note will conclude with proposals for possible legal tools both countries might

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27 But see David Brooks, Kicking the Secularist Habit, ATLANTIC, Mar. 2003, at 26 (noting that Osama bin Laden and Mohammad Atta, two of the masterminds of the 9/11 attacks, were from wealthy families).


30 Id.

31 ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 117.
employ to limit future outbreaks of indigenous religious violence, namely the establishment of judicial solutions, the need for strong political leadership supporting constitutional principles, and reformed interpretations of Shari’a within the Muslim community.

II. BACKGROUND SUMMARY

A. Sources of Islamic Law

At the core of Islamic law are the Quran and the Shari’a. The most significant text is the Quran, which Muslims regard as the words of God. The Quran is not a compilation of laws per se; rather, it contains religious and ethical values to which Muslims must adhere. The essence of Islamic law is the Shari’a, part of which comes from the Quran, “a source of law and moral guidance.” The Shari’a did not develop through judicial decisions and precedents, nor through legislation, but was based on the opinion of the heads of schools of Islamic discourse. The Shari’a seeks to guide a Muslim’s life, addressing such matters as “religious ritual and prayer, fasting, almsgiving, and pilgrimages,” among other things.

The second source of Islamic law, answering what the Quran and Shari’a do not, is the Sunnah of the Prophet Muhammad. The Quran gives rise to the Sunnah by saying, “[o] you who believe, obey God and the Prophet... and if you are at variance over something, refer it to God and the Messenger.” The Sunnah, in essence, is a record of the Prophet Muhammad’s sayings, deeds, and tacit approval of deeds. Muslim scholars interpreted the Sunnah and transmitted it through narrative records known as hadiths. The most accurate hadiths come from approximately the middle of the ninth century A.D.
following the Sunnah, Muslims hope to achieve the Prophet Muhammad’s perception of God.  

The third source of law is qiyas, reasoning by analogy, which is a restricted form of ijtihad, personal reasoning or interpretation. More succinctly, qiyas is described as “establishing the relevance of a ruling in one case because of a similarity of the attribute (reason or cause) upon which the ruling was based.” Jurists use this method to broaden an existing rule to encompass a situation that the Quran or the Sunnah does not directly address.

The fourth source of Islamic law is ijma, which is split into two types. The ijma al-ummah is the consensus of the whole community. The ijma al-aimmah is the consensus of religious authorities regarding the interpretation of a Quranic text or tradition, or a development of legal principle. Typically, ijma was most useful in a situation where questions arose about a Quranic text or tradition, or a problem of which no Sunnah existed. The jurists then applied their own reasoning to reach an interpretation. Over time, if a consensus of scholars reached the same conclusions, then it could be concluded that an ijma of scholars had been reached on an issue.

In addition to those sources, the four Sunni schools of law developed and utilized subsidiary legal methods whose primary purpose was to ensure justice and equality. Countries such as Tunisia used this subsidiary source of law to restrict questionable practices once allowed under Islam such as polygamy. Nigeria and India apply Maliki law and Hanafi law, respectively, two of the four Sunni schools of law that use these subsidiary legal methods.

A subsidiary source of the Maliki school used to interpret law is istislah, which is based on the belief that God’s purpose for Shari’a was the benefit of human welfare. Cases using istislah must involve social transactions, rather

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43 See THE STRAIGHT PATH, supra note 2, at 77.
44 See ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 6.
45 Id.
46 LIPPMAN ET AL., supra note 36, at 32.
47 ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 7.
48 Id.
49 See id.
50 Id.
51 Id.
52 Id. at 8; see generally LIPPMAN ET AL., supra note 36, at 33.
53 LIPPMAN ET AL., supra note 36, at 33.
54 Id.; ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 8-9.
than religious observances, and the determination of public interest must be in harmony with the spirit of Shari'a.\textsuperscript{55}

A subsidiary source of Hanafi law is \textit{istihsan}, or juristic preference.\textsuperscript{56} Pursuant to \textit{istihsan}, if analogous reasoning leads to a harsh outcome in a situation, then equitable principles can be applied to lessen the severity of the result.\textsuperscript{57} Some applications of Shari'a seem unduly severe from a western perspective.

Regarding criminal law, Islam criminalizes and imposes harsh penalties on actions that might be either misdemeanors or outside the realm of criminal law in Anglo-American jurisdictions.\textsuperscript{58} For example, adult consumption of alcohol, fornication, and adultery are all criminal transgressions under Islamic law. These actions are not punishable criminal actions in many other legal systems.\textsuperscript{59}

Islamic law in Nigeria and India takes a path different from other countries. Variations arose in the application of Islamic laws because foreign states, through invasion and colonization, influenced the various countries and their Islamic laws in different ways.\textsuperscript{60} While the Arab nations of the Middle East have codified Shari'a doctrine, India, due to the influence of British practice, has implemented a case law system where Islamic law cases are based upon legal precedent.\textsuperscript{61} Nigeria's Shari'a courts determine outcomes on a case-by-case basis without using precedent.\textsuperscript{62} While India departed from traditional Islamic legal practice with its reliance on precedent, Nigeria followed traditional Islamic legal practice by allowing judges to apply the law on a case-by-case basis.

\textbf{B. Nigerian Legal History}

Nigeria is a multireligious society. The history, society, and culture of Nigeria have produced a complex mix of Islamic and Western, primarily Anglo, political thought.

\textsuperscript{55} See LIFFMAN ET AL., \textit{supra} note 36.
\textsuperscript{56} See ESPOSTO, \textit{WOMEN IN MUSLIM FAMILY LAW}, \textit{supra} note 3, at 8.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} LIFFMAN ET AL., \textit{supra} note 36, at 120.
\textsuperscript{59} \textit{Id.}
\textsuperscript{61} See ESPOSTO, \textit{WOMEN IN MUSLIM FAMILY LAW}, \textit{supra} note 3, at 74.
\textsuperscript{62} See \textit{THE STRAIGHT PATH}, \textit{supra} note 2, at 86.
Nigeria gained independence from the United Kingdom on October 1, 1960, and became a republic on October 1, 1963.\(^6\) The country adopted the British model of government, but soon realized that system would not work for its heterogeneous society.\(^6\) Nigeria created a federal system with states in 1967, just as the country faced possible disintegration after a thirty-month civil war.\(^6\) In 1979, a new constitution came into effect.\(^6\) The new constitution provided for a National House of Assembly, composed of a Senate and House of Representatives at the federal level, and also State Houses of Assembly at the state level.\(^6\)

During colonization of Nigeria, the British introduced common law to the country's legal system.\(^6\) Under the Foreign Jurisdiction Act of 1830, which allowed the Governor General to make laws for the colonies, the British enacted the Interpretation Act for all of Nigeria, and by that act, all laws that were in force in England on January 1, 1900, were to apply to Nigeria.\(^6\) Although after independence there were many acts passed by regions around the country in an effort to reflect indigenous values, some English laws remain today.\(^7\)

Prior to democratic elections in 1999, the members of the governing Military Council promulgated a new constitution for the federal government.\(^7\) The 1999 Constitution is Nigeria's most recent constitution and reflects Nigeria's colonial and post-Independence heritage.\(^7\) The 1999 elections produced a new president and a new parliament.\(^7\)

\(^6\) There are three large tribes in Nigeria: the Hausa-Fulani in the north, the Yoruba in the west, and the Igbo in the east. Toyin Falola, *The History of Nigeria* 10 (1999). In the 1960s and 1970s, conflict between the tribal regions and ethnicities waned as the federal government strengthened its control over the states. *Id.* The Hausa-Fulani in the north are predominantly Muslims, and the Yoruba are as well. Paul Marshall, *The Talibanization of Nigeria* 20 (2002).
\(^6\) *Id.*
\(^6\) *Id.*
\(^6\) Madza, *supra* note 65.
\(^6\) *Id.*
\(^7\) *Id.*
\(^7\) *Id.*
\(^7\) *Id.*
\(^7\) *Id.*; Lyman, *supra* note 29. President Obasanjo is a born-again Christian. *Id.*
While Nigeria’s constitution states that the country is to be a secular state, its northern states use Shari’a in civil and criminal cases. The northern states’ expansion of Shari’a to cover criminal conduct has threatened Christians and other non-Muslims living there, especially since certain acts actionable under Shari’a are not actionable under non-religious based civil laws.

At the state level, Shari’a courts satisfy the Muslim community’s demand for a court that would administer personal laws as Islam requires. These Shari’a courts have jurisdiction over Islamic personal law cases, but only at the request of the parties. Each state also has a Shari’a court of appeals which hears appeals from lower courts in matters of Muslim personal law, applying Islamic law of the Maliki school. Its decisions are final, except in cases where a constitutional question would bring it to the Nigerian Supreme Court. There is also a court of resolution in each of the northern states, which tries to settle conflicts of jurisdiction among the various courts.

While the constitution provides for Shari’a courts of appeals when individual states create them, it denied Shari’a law a separate functioning federal-level court to avoid the judicial confusion that would arise from having two courts of concurrent jurisdiction. Federal appellate review of Shari’a cases by the Supreme Court could be important since it may be the vehicle to

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74 See NIG. CONST. art. 10 (allowing for Shari’a courts under article 260); Philip Bowring, Opinion, Islam and Development Can Go Together: A Look at the Facts, INT’L HERALD TRIB., July 30, 2002, at 4, available at 2002 WL 2887891 (recognizing that secular states with a majority Muslim population, such as Bangladesh and Indonesia, have excellent records in education and are outperforming many other non-secular majority Muslim countries and adding that an expansion of Shari’a may set back social and economic development).

75 Lyman, supra note 29. The non-federal government sanctioned religious police, called hizbah, who enforce the Shari’a are a threat to Christians and other non-Muslims. The migration of Christians into cities such as Kaduna, the site of the November 2002 Miss World riots, and Kano, the north’s industrial center, has caused increasing tension since the imposition of more extensive Shari’a in those regions. Id.

76 See NIG. CONST. art. 10.

77 Madza, supra note 65, at 25.

78 Id.; see also Philip C. Aka, Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo, 4 SAN DIEGO INT’L L.J. 209, 240.

79 OKONKOVO, supra note 63, at 141-42.

80 Id. at 130.

81 Madza, supra note 65, at 25.

dismiss frivolous cases, overturn controversial decisions, and release wrongly-imprisoned individuals accused based on technicalities. On the other hand, existing Shari’a courts of appeal at the state level may serve a similar purpose.

Political divisions along religious lines manifested themselves again in the second republic, between 1979 and 1983. The debate over Shari’a in 1979 illustrated the phenomenon. The Muslim members of the Constituent Assembly had suggested the insertion of a special provision in the 1979 Constitution to establish a Shari’a court of appeal with jurisdiction over matters of Islamic personal law. Upon the initial rejection of this suggestion, all Muslim members of the Constituent Assembly boycotted further deliberations of the assembly. It took the intervention of the head of state to bring them back. The assembly never actually established the court, but the Nigerian Supreme Court has had justices learned in Islamic law.

A grand khadi, or chief judge, heads the Shari’a court of appeals, and the Assembly of that state may prescribe such other khadis, or judges, as may be necessary. Grand khadis are appointed in the same way as chief judges of the states’ high courts, and likewise, khadis are appointed in the same manner as the judges of the states’ high courts. Those who are appointed as Shari’a court khadis must be well versed in Islamic law, but they need not be lawyers and are often retired senior administrative officers.

Until recently, Muslim judges tried criminal cases such as homicide and adultery under Islamic law according to statutory law from English common law and Nigerian statutes. With the northern states’ extension of Shari’a to criminal cases, northern Nigeria joins a small list of countries that are

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84 Oko, *supra* note 82, at 352, having a Shari’a court of appeals would have created two courts of concurrent jurisdiction, leading to confusion. Madza, *supra* note 65, at 25.

85 Id.


87 Id.

88 Id.

89 Id.

governed purely by Shari'a. Zamfara was the first state in Nigeria to implement full scale Shari'a, and other northern states have since followed Zamfara in its full implementation of Shari'a. Some say that the northern states' extension of Shari'a to crimes followed the democratic election of Olusegun Obasanjo, a non-Muslim, as President. The extension may demonstrate an unwillingness of northern Nigerian states to have a non-Muslim president.

The extension of Shari'a to criminal actions means harsher punishments and less discretion for Shari'a court judges. For adultery, the punishment under Shari'a is stoning to death. When a person is guilty of theft, the punishment is amputation of the hand, and for a second offense, it is the amputation of the second hand. Beyond imposing harsh sentences, Shari'a also gives men more opportunities to escape harsh punishment than women. An example of men's favorable treatment relative to women is that while evidence of a woman's adultery may be shown by pregnancy, a man suspected of fathering the child may be freed by swearing on the Quran that he never touched the pregnant woman. The northern states' extension of Shari'a to criminal conduct is not a natural evolution of Nigerian law.

Nigeria also established customary courts as a non-Muslim alternative to Shari'a courts. These courts reflect Nigeria's heterogeneous society by accounting for customs of the various ethnic communities relating to marriages, bride price, succession, chieftaincy, and land tenure, as established in the laws of the states. Any changes to Shari'a law may be viewed as a threat to the existence of these customary courts.

91 See Binyon, supra note 83 (emphasizing that of the nations that use Shari'a in civil and criminal cases, besides Nigeria, only Iran enforces the provision on stoning; explaining that some argue that stoning is not a part of the Quran, noting that Sura 24, dealing with sex outside of marriage, orders only floggings and harsh punishments for those making unfounded accusations).

92 Id.

93 Id.

94 Id.

95 Id.

96 Id.

97 See id. at 42-43.

98 See id. at 42.

99 Id.

100 Id.
C. Indian Legal History

Historically, Hindu and Muslim religious systems applied to all aspects of life in India, a multireligious society. However, the British introduced a distinction between religious and secular law in 1772. Under the Regulating Plan of 1772, the colonial power established a limited judicial system in areas of its control, such as Bungal, whereby nonpersonal laws were codified and made uniform, leaving only personal law and laws relating to certain property transactions to be regulated by Hindu and Muslim religious law. Estab- 

ishing religion as the basis of personal laws highlighted differences between Muslim and Hindus. The reasons for the distinction between basing personal laws on religion and codifying civil, criminal, and commercial laws in a uniform way may lie in British efforts to maintain control over India. Separating the personal laws of Indian society on religious grounds exposed differences between Hinduism and Islam. The argument that the British retained personal laws solely in deference to the sentiments of Hindu and Muslim Indians cannot be sustained since the claims of other religious groups, such as Jews and Parsis, were not considered until the middle of the nineteenth century.

The British further consolidated their position in India, and codified commercial, criminal, and procedural law by 1882. They exempted a few personal laws, such as marriage and divorce, inheritance, and succession from this codification. In the colonial era, the State embarked on a series of modifications in personal laws, initiating a policy known as the Islamization of Muslim law and the Sanskritization of Hindu law. The British chose to use the Quran and Shastras as the basis of personal laws, not leaving custom and usage to govern those laws. The colonial view of the Hindu and Muslim communities as oppositional, distinct, and homogenous, and the presumption that the primary sources of law were the Quran for Muslims and the

102 J. DUNCAN M. DERRETT, RELIGION, LAW, AND THE STATE IN INDIA 232-37 (1968); MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 17 (1989).
103 Id.
104 See Narain, supra note 101.
105 Id.
106 Id. at 46.
107 Id.; see GALANTER, supra note 102, at 21-25.
108 Id.; see DERRETT, supra note 102, at 275.
Brahaminical Shastras for Hindus informed the conceptualization of personal laws. This privileging of textual law over custom and usage served to make personal laws rigid and abstract, and unable to respond to the daily experiences of those they were meant to serve. This practice also resulted in the British establishing religion and personal laws as important signifiers of community identity, as the colonial legal structure administered a unified Muslim law hitherto unknown in India.

After placing Hindus and Muslims under separate codes, the British further modified and influenced Muslim and Hindu personal laws. British judges applied common law maxims in deciding personal law cases. When a rule of common law was suitable for application to an Indian situation, the rule was applied. Precedent was also binding upon the courts, and some of the substantive principles of common law were thereby incorporated into personal laws.

By the twentieth century, there were several initiatives by Indian Muslims to modify their personal laws. The colonial government acknowledged the ulema, Muslim legal scholars, and the Muslim League as the leaders of the Muslim community in this movement to change Muslim personal laws. The ulema's movement to adopt Muslim personal laws suggests that the impetus for reform was the consolidation of their political power. Excluded by the colonial state from all other aspects of national politics, religion and community were the only spheres in which the ulema could assert its authority and stake a claim to political power. The ulema therefore took the initiative to reform Muslim personal law and actively sought to reduce the role of custom over which they had no jurisdiction while bringing the Muslim population under the authority of the Shari'a, of which they were the sole interpreters.

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109 Narain, supra note 101; see Derrett, supra note 102, at 275.
110 Narain, supra note 101; Galanter, supra note 102, at 24-25.
111 Id.
112 Id.
113 See id.
114 See Esposito, Women in Muslim Family Law, supra note 3, at 74.
115 Narain, supra note 101, at 47. In pre-colonial times, Muhammad Iqbal, a prominent Indian Muslim leader, blamed the Ulema for the conservative character of Islam. Along with others, Iqbal sought the reinterpretation of Islam in light of modern realities. The systemic reconstruction that Iqbal advocated never occurred. See Esposito, Women in Muslim Family Law, supra note 3, at 139-42, 250.
117 Id.
118 See id.
“In fact, these legislative initiatives only served to Islamisize Indian Muslim personal laws” and as a consequence, Muslim women became subject to more rigorous control under the high Islamic law.\(^{119}\) “The significance of the ulema’s legislative initiatives was that it set the pattern for an increasing use of Islam by religious leaders to further their political ends.”\(^{120}\) Prior to India’s independence, two major legislative initiatives of the ulema passed: the Muslim Personal Law Application Act (Shari’at Act) in 1937, and the Dissolution of Muslim Marriages Act in 1939.\(^{121}\) The ulema insisted on the application of the Shari’a to all Indian Muslims\(^{122}\) and the imposition of a uniform Islamic identity on the Muslim population through the Shari’at Act.\(^{123}\) British authorities accepted this demand and privileged the Quran as the sole authority for Muslim law.\(^{124}\)

All aspects of personal law were to be governed by the Shari’at Act except inheritance and succession for agricultural land holdings.\(^{125}\) Passage of the Shari’at Act helped the ulema solidify their central role in the Indian Muslim community.\(^{126}\) Although one reason the ulema proposed the Shari’at Act might have been to improve women’s inheritance rights and their economic position, the gains proved to be more symbolic than real.\(^{127}\) For example, Muslim women did not gain the right to inherit agricultural land, which constituted 99.5 percent of all real property in India at that time.\(^{128}\)

Another way the treatment of Muslim men and women differs under Shari’a in India is that Muslim women do not have a unilateral right to divorce. A Muslim husband can say “I divorce you” three times to dissolve a marriage, while the wife has no similar right.\(^{129}\) Although women’s rights groups and social activists have demanded a change to this practice recently, the Indian government has refused, arguing that the changes to Shari’a must come from

\(^{119}\) Narain, supra note 101, at 46.
\(^{120}\) Id. at 47-48; see BRASS, supra note 116, at 81-82 (discussing the ulema’s focus on Shari’a and influence on political groups).
\(^{121}\) Narain, supra note 101, at 48.
\(^{122}\) Id.
\(^{123}\) Id.; see BRASS, supra note 116, at 89 (noting how the ulema’s goal of uniform application of Shari’a “articulated a modern conception of ‘territorial statehood’ ”).
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) Id.
\(^{129}\) ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 112.
ISLAMIC LAWS IN INDIA AND NIGERIA

within the Muslim community.\textsuperscript{130} The Indian Parliament’s decision to wait and let the leaders of the country’s Muslim community come forward and ask for a change in personal status laws before changing Shari’a comes at the expense of denying immediate constitutional benefits to Muslim women.\textsuperscript{131}

The government of India has chosen not to acknowledge some basic conflicts that exist between its constitution and Shari’a. For example, the preamble to the Indian Constitution undertakes to secure justice, liberty, and equality for all citizens.\textsuperscript{132} This statement recognizes India’s belief in justice, liberty, and equality, but the Indian government has been reluctant to deliver those concepts to Indian Muslim women who live under Shari’a. The constitution also guarantees “the right freely to profess, practise and propagate religion.”\textsuperscript{133} Still the constitution implicitly recognizes the conflicts that might emerge with the free exercise of religion when it makes such freedoms subject to “public order, morality and health” and makes exemptions for economic regulation in addition to social welfare legislation.\textsuperscript{134} Last, Article 44 states “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”\textsuperscript{135} Despite these constitutional principles and directives, the Parliament has not put all Indians under one civil code.

The Parliament also overruled the Indian Supreme Court when the court sought to award a divorced Muslim woman maintenance beyond the three-month period that Shari’a law prescribed.\textsuperscript{136} In \textit{Bano}, the court relied on Section 125 of the Criminal Procedure Code, which states that when a divorced wife has no independent means to support herself, the husband has the responsibility to provide her with maintenance.\textsuperscript{137} The Chief Justice of the

\textsuperscript{130} Shefalee Vasudev, \textit{Muslim Marriages: Taming Talaq}, INDIA TODAY, May 20, 2002, at 60, available at 2002 WL 2211712 (citing Aawaz-e-Niswan, located in Mumbai, and Asmita, located in Hyderabad, as two of the many groups fighting for women’s empowerment within Indian society).


\textsuperscript{132} INDIA CONS. pmbl. (amended 1976).

\textsuperscript{133} INDIA CONS. art. 25.

\textsuperscript{134} INDIA CONS. art. 25.

\textsuperscript{135} INDIA CONS. art. 44.


\textsuperscript{137} Esposito, \textit{WOMEN IN MUSLIM FAMILY LAW}, supra note 3, at 115; INDIA CODE CRIM. PROC. § 125. The relevant provision states:

(1) If any person having sufficient means neglects or refuses to maintain (a) his wife, unable to maintain herself, . . . a Magistrate of the first class, may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife . . . at such monthly rate not
Indian Supreme Court added that the decision was consistent with the Quran and that the judgment asserted the primacy of the Indian Constitution to all Indian citizens over personal religious codes. This was controversial because it conflicted with Muslim religious leaders' claim that only they have the right to interpret the Quran.

After the court issued its decision and outrage from the Muslim community and ulema ensued, the Indian Parliament passed the Muslim Women's Protection Act in 1986, codifying Muslim personal law and allowing a Muslim woman to receive maintenance only during the first three months following her divorce. In this instance, the Parliament chose not to allow the Supreme Court of India to let secular law override Shari'a. In accepting the views of the conservative ulema of India, the Indian government has shown its acceptance and confirmation of Shari'a even when it explicitly conflicts with secular laws and limits women's rights. Due to this state of affairs, Islamic law in India does not reflect the range of reforms and progress of Muslim majority countries, such as Egypt.

Due to Parliament's quashing of the Bano decision, Shari'a reform through judicial decisions has stalled. Subsequent to the Parliament's actions, the judiciary has not actively sought to continue in the direction the Bano decision would have gone.

D. Domestic Climate of India and Nigeria

Recent events in India and Nigeria reflect the tensions between the religious communities in both countries. Both countries are grappling with the effects exceeding five hundred rupees in the whole, as such Magistrate thinks fit.

Id.
138 Esposito, Women in Muslim Family Law, supra note 3, at 115.
139 Id. at 116.
140 Id.
141 See id. (noting that Egypt passed laws to restrict polygamy, limited a male's unfettered right to divorce, and granted women additional grounds for divorce; noting these changes occurred through a process of reinterpretation that sought to provide an Islamic rationale for reforming tradition). See also Sampak P. Garg, Law and Religion: The Divorce Systems of India, 6 TULSA J. COMP. & INT'L L. 1, 19 (1998) (emphasizing the Dissolution of Marriages Act gave wives the legal means of obtaining divorces; although not allowing wives the right to divorce at the pronouncement of the word talaq, the act closed the gap between the two spouses).
142 See Lakshmi Iyer, Muslim Child Marriage: Nothing Personal, INDIA TODAY, July 22, 2002, at 49, available at 2002 WL 2211956 (noting recent case in India involving child marriage); see also Paul Marshall, Viewpoint, U.S. Oil Interests are Threatened by Sharia,
of Shari'a on their multi-religious, democratic societies. While religious violence in India is not solely attributable to the existence of Shari'a, the situation is quite different in Nigeria.\textsuperscript{143}

As noted above, some states in Nigeria recently expanded Shari'a to cover criminal conduct, such as out-of-wedlock fornication, out-of-wedlock pregnancies, adultery, and stealing.\textsuperscript{144} This expansion of Shari'a may be a reaction by the northern states to corruption, crime, and the failure of civil law to provide justice.\textsuperscript{145} It may also be a symptom of increasing fundamentalism and separatism.

In Nigeria, the extension of Shari'a law has created turmoil between the federal government and the northern states. For instance, the state of Zamfara now requires "Islamic" dress, has gender-segregated public transportation, has banned alcohol, and has closed non-Muslim schools.\textsuperscript{146}

Nigerians have been sentenced to stoning for committing adultery, rape, and partially blinding a friend.\textsuperscript{147} Fatima Umaru and Amadu Ibrahim were sentenced to stoning by death for having a sexual relationship out of wedlock.\textsuperscript{148} A Shari'a court sentenced Amina Lawal to be buried up to her neck and stoned to death for becoming pregnant out of wedlock.\textsuperscript{149} Her alleged lover, however, did not receive any punishment. The Lawal case demonstrated Shari'a’s disparate treatment of males and females.\textsuperscript{150}

Harsh sentences have also been imposed for other crimes, such as stealing.\textsuperscript{151} For example, Buba Bello’s right hand was amputated after the court found him guilty of stealing.\textsuperscript{152} In another example, Ibrahim Namadi received a sentence of forty lashes after being caught stealing a cheap gold-
plated necklace to feed his family. Amputation was a possible punishment for the theft, but the Shari'a court only punished him with lashes because it determined the failure of the state to provide for him caused him to steal.

The expansion of Shari'a law is creating wider conflicts that Nigeria must confront. For instance, several states have begun to buy arms, something only the federal government is authorized to do, apparently in order to protect their legal policies against changes instituted by the federal government. States have also sanctioned non-federally recognized religious police to enforce the Shari'a. In addition, Zamfara's state assembly suspended democratically elected Muslim legislators who opposed the extension of Shari'a. Zamfara's governor stated that Shari'a supersedes the Nigerian constitution. He also called for the states that broadly implement Shari'a law to form their own army to defend Muslims and promote Islam.

Unlike Nigeria, India is not facing potential widespread religious conflict or increasing tensions between the states and the federal government as a result of an expansion of Shari'a. However, controversial issues surrounding Shari'a law exist, and there has been ongoing religious violence between Hindus and Muslims for a variety of other reasons.

In India one controversial issue is the possible imposition of a uniform civil code. While Article 44 of the Indian constitution is an important stated principle, it has largely remained ineffective and meaningless. A major issue would likely arise if Muslim husbands were forced to give up the right of talaq (unilateral divorce), or if Hindu husbands were granted talaq rights. If a uniform code removed talaq, Muslim husbands could claim that their

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153 Id.
154 Id.
155 See Marshall, U.S. Oil, supra note 142.
156 Id.; see also Editorial, Thwarting an African Taliban, WASH. POST, Nov. 28, 2002, at A46, available at 2002 WL 103572267 (noting that the governor of Yobe state in northern Nigeria has promised to defend its Shari'a code even if it results in civil war); see also THE STRAIGHT PATH, supra note 2, at 224 (emphasizing that pro-Islamic forces have resorted to violence to achieve their ends).
157 Thwarting an African Taliban, supra note 156.
158 Id.
159 Id.
160 Id.
161 See Vasudev, supra note 130; Garg, supra note 141, at 19.
162 Vasudev, supra note 130.
164 Vasudev, supra note 130.
cultural traditions were compromised, and Muslim women could claim that their tradition suffered.\textsuperscript{165} On the other hand, reforming Muslim laws could empower Muslim women by making them less likely to be divorced using an informal method such as \textit{talaq}.\textsuperscript{166}

In November 2001, a state court in India imposed a three-month jail term for parties who violated a child marriage law, causing concerns within the Muslim community.\textsuperscript{167} Based on that decision, the All-India Muslim Personal Law Board declared that this 1929 law imposing the three-month jail term was not applicable to Muslims and the defendant is currently appealing the decision.\textsuperscript{168} In addition, a Mumbai high court recently stated that Muslim divorces will have to be proved in a court of law under the Indian Civil Procedure Code.\textsuperscript{169} These issues again made people in India conscious of the differences that exist between Muslim personal laws and their potential conflict with other Indian laws.

These recent decisions have elicited responses from traditional forces within the Muslim community about their objections to having the Indian Supreme Court and the high courts interpret the Quran,\textsuperscript{170} and these examples illustrate that issues surrounding Muslim law continue to grow. In Nigeria, the issue is the expansion of Muslim laws into criminal conduct. Meanwhile, in India, Shari’a is allowed to supersede the Supreme Court and other court decisions that interpret the conflict between Muslim law and secular law, to favor the secular law.

Both Nigeria and India are home to vocal and energetic Muslim communities that are eager to maintain Shari’a for personal status issues and that equate Shari’a with their identity. In Nigeria this community has gone further by extending Shari’a to criminal conduct. Efforts to reform Shari’a or stop its extension are subject to practical and political complications.

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Iyer, supra note 142.
\textsuperscript{168} Id. The All-India Muslim Person Law Board has taken this position because it feels the Muslim Personal Law Act supersedes the older 1929 law. \textit{Id.}
\textsuperscript{169} Vasudev, supra note 130.
\textsuperscript{170} \textit{Id.}
A. Comparison of India and Nigeria in Their Application of Islamic Laws

The Indian and Nigerian constitutions both express a respect for human rights, liberty, and freedom of religion. Conflicts may develop with these principles when Islamic laws impose limits to personal freedoms or give more rights to men than women. Therefore, the question becomes how each government deals with the problems that arise when religious law, applied in personal and criminal law, conflicts with secular civil and criminal laws.

There may also be political considerations for a country to allow Shari’a to exist at the same time as secular laws. In India and Nigeria, the Islamic laws in force are conservative in nature. There are no signs of any intent to reform these laws, as other countries with Muslim populations have done.

In contrast to allowing traditional interpretations of Shari’a, the state might assert its authority to interpret religious law, either to determine whether there is a conflict between it and secular law or to find a basis within Shari’a for resolving an apparent conflict with non-religious based law. The interpretation of religious law by secular courts or legislators raises several issues. The interpretation could be viewed to violate the freedom to practice religion by expounding a definition of religious doctrine that will be enforced by the regulatory power of the state. The effects of the interpretation of religious law by secular authorities could also be viewed to have an effect on the content of doctrine as embodied in religious observance. In addition, Islamic religious leaders and jurists oppose the state’s attempts to reform religious law.

Recognizing and grappling with these issues may assist a country in its efforts to avoid civil conflict based on the religious differences existing within its population. It may also help stop the spread of fundamentalist Islamic terrorism by eliminating a climate ripe for terrorist organizations from which to recruit. In addition, the rights of Muslim women could be expanded when dealing with these issues. With this in mind, this section will examine and formulate solutions for those issues in the Indian and Nigerian contexts before moving on to a comparison of India and Nigeria’s efforts to deal with Shari’a.

The constitutions of Nigeria and India provide a good beginning point for the analysis. The Nigerian Constitution states that the country is to be a secular state. Despite that pronouncement, though, another part of the

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171 INDIA CONST. pmbl.; NIG. CONST. art. 10.
172 NIG. CONST. art. 10.
constitution allows Shari'a to be used in a judicial context. The preamble to India's Constitution states that the constitution undertakes to secure for all citizens justice, liberty, and equality. In addition, Article 44 of the Indian Constitution recognizes the need for a uniform civil code. These guiding principles drive the examination of how each country deals with Shari'a.

The principles embodied in these two constitutions provide a strong foundation for the fundamental rights of Nigerian and Indian citizens. Since the constitutions establish the structure of India and Nigeria's democratic societies, this foundation should be the beginning of any discussion of efforts to expand or reform Shari'a. Opponents of Shari'a expansion and proponents of Shari'a reform would be able to demonstrate that their efforts parallel and are buttressed by their country's most basic governmental document. On the other hand, those who support the expansion of Shari'a and oppose Shari'a reform may claim that the Quran, not a nation's constitution, is the highest law. Alternatively, they could argue that each nation's constitution allows the free exercise of religion and practicing Shari'a is a key part of the free exercise of Islam.

The constitutional arguments stand in contrast to the framework of those who seek to institute Shari'a criminal laws in Nigeria. In their framework, the proponents of Shari'a expansion claim that Islam is a comprehensive way of life, above politics, law, and society. They also claim that the failure of their society and the problems that exist in Nigeria are due to the society's departure from the straight path of Islam and adopting a Western secular path. Another argument of proponents of Shari'a expansion is that replacing Western-inspired civil codes with Shari'a restores God's rule and introduces a true Islamic social order. In addition, proponents believe that the process of returning to traditional Islam by rejecting secularism and Westernization requires organizations of dedicated and trained Muslims, requiring them to be

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173 Id. art. 260.
174 INDIA CONST. pmbl.
176 THE STRAIGHT PATH, supra note 2, at 165.
177 See Doran, supra note 175 (suggesting in the Nigerian context, Christianity may be viewed as a symptom of Western imperialism, and animism may be viewed as a return to the pre-modern indigenous culture that existed in Nigeria).
178 THE STRAIGHT PATH, supra note 2, at 165.
more observant of religious doctrine and willing to struggle against the corruption and injustice embodied in the status quo.  

Choosing to establish Shari'a jurisdiction over criminal conduct in Nigeria might be viewed as a response to widespread corruption, inefficiency in the regular court system, or a reaction to prior military rule. In contrast to that view, some human rights organizations have noted that previous trials in Shari'a courts have been characterized by an absence of due process. In Shari'a courts, defendants also do not always have legal representation; they are often ill-informed about procedures and about their rights. In addition, judges and other Shari'a court officials frequently lack proper legal training.

The expansion of Shari'a to a criminal context may also be an acknowledgment or indication that Islam cannot peacefully co-exist with Christianity, animism, and other religions in Nigeria. Fundamentalist Islamics may view members of the minority religions, particularly Christians, as those who cooperated with the colonial powers and benefited from their protection. The worst fear of non-Muslims is a return to the special status of religious minorities under traditional Shari'a where non-Muslims belonged to a separate class of citizens who constituted their own community but did not receive all the rights accorded to Muslims.

Additionally, the expansion of Shari'a may reflect a failure to modernize, may signify a revival of old Islamic traditions, or may result from the importation of Islamic tradition from other parts of the world, particularly the Middle East. It may also signify the failure of moderate Islam and the strength of conservative Islam.

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179 Id.
180 See The Attractions of Sharia, supra note 28 (comparing Nigerian & Shari'a courts). Nigeria has crumbling courtrooms where judges take evidence in long-hand; judges have been known to take bribes; trials in non-Shari'a courts involve expensive lawyers and lots of paperwork; and inmates await trials for long periods and many are released because they have already served the maximum sentence allowable for the crime of which they have not yet been convicted. In contrast, Shari'a courts provide efficient justice and people can represent themselves in court, saving legal fees. Id.
182 THE STRAIGHT PATH, supra note 2, at 242.
183 Id.
184 See AZUMAH, supra note 20, at 202 (mentioning that the governor of Zamfara sent people to Saudi Arabia to receive training as Shari'a court judges, seeking to emulate the Saudi Arabian Shari'a system).
185 Id. at 197.
difficult to find reasoning in Islamic religious texts that promotes peaceful co-existence on equal terms with non-Muslims. In a sense, these reformers are going against traditional Islamic views of non-Muslims that are firmly grounded in Quranic texts. Conciliatory passages are often seen as being abrogated by antagonistic ones. Yet the expansion of Shari’a to a criminal context has significant implications for non-Muslims. The political leaders of northern Nigeria are favoring Muslims at the expense of non-Muslims, and expanding Shari’a may not only institutionalize and sanction discrimination along religious lines but also impose Islamic value systems and legal codes on non-Muslims.

As noted above, Article 44 of the Indian Constitution is a source of the potential uniformization of India’s civil laws. While this principle should be taken seriously as a guide for Parliament, its failure to enact such legislation is not justiciable in court. Creating a uniform civil code would face strong opposition from India’s Muslim community.

The Indian Constitution makes a clear distinction between the separate realms of religion and the secular. Some Indians view the notion of secularism itself not to be religion-neutral, but in fact informed by and reflective of the values of the dominant Hindu majority. Although the category of the secular state has served a wide range of interests, its constitutional meaning, as interpreted by the courts, has defined the Indian secular state as embodying a distinction between these two realms irrespective of the religious community to which persons belong. The courts have certainly

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186 ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 100.
187 AZUMAH, supra note 20, at 202. Muslims and non-Muslims live side by side in northern Nigeria, and legal disputes do not only arise between members of the same faith in states with Shari’a. Id.
188 Id. at 202.
189 Menski, supra note 163, at 267.
190 See Baird, supra note 131, at 344 (citing experts who note both Muslim and Hindu communities have resisted the implementation of this article on the grounds that family law is not an issue to be regulated by the secular state).
191 See INDIA CONST. art. 44; Menski, supra note 163, at 292 (noting that Islamic countries have been successful in modernizing their family laws).
192 INDIA CONST. pmbl.
193 See Narain, supra note 101, at 62 (highlighting one objection raised by the Indian Muslims to the enactment of a uniform civil code is the fear that the code would be influenced by a Hindu perspective presented as neutral and secular, and this fear must be addressed by uniform civil code proponents).
194 Baird, supra note 131, at 354.
never identified the Indian State as tied to any particular religious tradition. Coupled with this has been the Indian Parliament’s reluctance to implement the uniform civil code or otherwise interfere with Muslims. Parliament did change the majority Hindu system of custom and belief. In general, Parliament stands ready to revise the personal status laws of minority communities, including Muslims, Christians, and Parsis, as it has done for Hindus, if a community comes forward and requests it. One reason for the lack of changes to Muslim personal law is that the Muslim community has not requested revisions.

India’s government fears backlash from the Muslim community if it institutes a uniform civil code, and conveniently overlooks the success of efforts to modernize Islamic laws in other countries. The Bano case contained controversial dicta that stressed the need to adopt a uniform civil code to replace the personal status laws applicable to the various religious communities in India versus reform of Islamic law. The court dismissed the argument that the reform of Islamic personal status laws must be accomplished from within the Muslim community. The court stated that no religious community in India was likely to take the lead in such reforms, and that it was the government’s duty to secure the uniform civil code contemplated by the Indian constitution.

The court’s call for a uniform civil code was echoed by anti-Muslim Hindu traditionalists who sought the abolition of Shari’a personal status law, intensifying the force of the decision as a reason for political cohesion among Muslims. Following losses in the election immediately after the Bano

195 Id.
196 Menski, supra note 163, at 292.
197 See Sumit Ganguly, The Crisis of Indian Secularism, 14 J. DEMOCRACY, at 13 ("[T]he constitution the framers produced was not religiously neutral. On the contrary, it contained explicit provisions abolishing certain retrograde features of Hindu society, namely, those associated with the practice of 'untouchability.' ").
198 Baird, supra note 131, at 354.
199 See id. (noting that Parsi law has changed once the Parsi community came to a consensus and requested the revisions).
200 However, these countries where modernization has occurred are majority Muslim, such as Egypt and Tunisia, while India has a minority of Muslims.
203 Id.
204 Id.
ruling, the Indian government succumbed to political pressure, and adopted the Muslim Women (Protection of Rights on Divorce) Act of 1986. This act was a reaction to the Bano ruling and made a divorced woman's relatives, as well as the Muslim religious endowments, responsible for her ongoing maintenance if she is indigent. One analyst noted that the act effectively allows husbands to divorce their indigent wives with impunity, leaving society to pick up the tab.

Some commentators feel that a uniform civil code is not the best solution since Muslims will not be satisfied if one is written and applied. Favoring the implementation of a uniform civil code overlooks the possibility of reinterpretation and reform in Islam. Reform-minded, modernist Islamic legal scholars acknowledge the immutability of Shari'a principles and laws found in the Quran and Sunnah. Their position rests on the distinction between the eternal validity of religious duties and the flexibility of much of law. This made it necessary and possible to reform Islamic law. Traditional authorities have been reinterpreted to justify reforms, and jurists could borrow from other schools of thought. For instance, the grounds for divorce were broadened in countries that followed Hanafi law by borrowing additional provisions from Maliki law, such as desertion, cruelty, and failure to maintain.

In contrast to the possibility of reform, it is the perception of some Hindus, especially those who support the Bharatiya Janata Party (BJP), that in accommodating minorities, the Indian government has ignored the values and wishes of the majority Hindu community which comprises some eighty percent of the population. The BJP, with its acknowledgment of Hindu religious beliefs, further holds that what has been called secularism since the institution of the Indian Constitution is really a pseudo-secularism since it favors the minority groups such as Muslims.

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205 Esposito, Women in Muslim Family Law, supra note 3, at 116.
206 Id.
207 Id.
208 Menski, supra note 163, at 253, 267; Baird, supra note 131, at 354.
209 See The Straight Path, supra note 2, at 148.
210 Id.
211 Id. at 147.
212 Id. at 148.
213 Esposito, Women in Muslim Family Law, supra note 3, at 56.
214 Id. at 56-57.
215 See Baird, supra note 131, at 354.
216 See id. at 355. They argue that they do not propose to make a Hindu state, but seek to
A majority of Hindus in India have consistently held that India is and shall be a secular state, but the content of that secular state has always been hotly debated.\textsuperscript{217} The BJP's solution is to develop what it terms a secular state, which happens to be a Hindu state, in the name of representing more fully the vast majority of Indians.\textsuperscript{218} Since the BJP's position is that Hinduism is a tolerant and peaceful religion, minorities would have nothing to fear.\textsuperscript{219} This position has been suggested from time to time since India gained its independence.\textsuperscript{220} Notably, Muslims see the BJP's current call for Hindutva, a Hindu Secular State, as a threatening call for the ultimate destruction of Muslims.\textsuperscript{221} Muslims feel Hindutva threatens their personal laws, faith, and way of life.\textsuperscript{222}

The controversy over the Indian Supreme Court's \textit{Bano} decision must be seen in the context of the escalating violence between the Hindu and Muslim communities in India, and the climate of fear created by the BJP.\textsuperscript{223} In these circumstances, efforts by the Supreme Court to reform Muslim personal law should avoid direct interpretation of religious texts, such as the Quran, without other supporting religious authority.\textsuperscript{224} In order to have established a more acceptable approach, the Supreme Court's call for a uniform civil code should have been explicitly related to gender discrimination in the personal status laws of other religious communities, as well as the Muslim community.\textsuperscript{225} By taking these steps or citing these concerns in its decision, the Supreme Court may have been able to mitigate the Muslim community's resistance.

\textbf{B. Alternatives to Extending Shari'a in Nigeria}

The expansion of Shari'a in this "halting the expansion will not be easy" passage reads too much like a polemic against Shari'a. Nigeria will likely continue, as even the national leaders of Nigeria may feel that halting Shari'a's expansion would do more harm than good. Regardless of the method used to

\begin{itemize}
\item [\textsuperscript{217}] Id.
\item [\textsuperscript{218}] Id. at 354-55.
\item [\textsuperscript{219}] Id.
\item [\textsuperscript{220}] Id.
\item [\textsuperscript{221}] Id. at 355.
\item [\textsuperscript{222}] Id.
\item [\textsuperscript{223}] See id.
\item [\textsuperscript{224}] Id.
\item [\textsuperscript{225}] See id. (discussing \textit{Bano} and the failure to develop a uniform civil code).
\end{itemize}
deal with the expansion, it is worthwhile to consider a range of possible options for Nigeria and for countries in a position to assist Nigeria.

An important factor for the government's ability to halt Shari'a expansion will be its ability to engage moderate Muslims to speak out against its disadvantages. These moderates are likely to want to restrict religion to private affairs and exclude it from public life. There is a possibility that these moderates will be viewed suspiciously by other religious leaders in the Muslim community. If attacked as non-believers, moderates could counter that they are religious but believe religion should be restricted to private life via prayer, fasting, pilgrimage, and personal morality.

These moderates have to counter conservatives, or traditionalists, who view Islam as a closed cultural system fully articulated in the past that has governed the Muslim community through the centuries, remaining as valid for today as the future. For these conservatives, Shari'a is the divinely revealed path and it is not the law that must change or modernize, but the society that must conform to God's will. Thus, the remedy is not adaptation and change to suit modern times but an anti-modern return to established norms.

In the past, when moderate Islamic leaders reviewed Shari'a and tried to update it, they approached the task in a piecemeal manner, fearing its consequences, not as a systemic assessment of Islamic law. The moderates' position could rest on the distinction used in early Islam between eternal validation of religious duties and the flexibility of much of social law. In this way, they asserted that Islamic reform was necessary as well as possible.

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226 THE STRAIGHT PATH, supra note 2, at 228.
227 Id. at 230. Opponents sometimes characterize moderates as agents of Western imperialism, undercutting their credibility. Opponents of moderates further revel in using Islam to distinguish themselves from the West by upholding traditional prohibitions and punishments for drinking alcohol, gambling, and fornication. Id.
228 See THE STRAIGHT PATH, supra note 2, at 156.
229 See id. at 251.
230 Id.
231 See id. at 148; Charles Krauthammer, Editorial, Violence and Islam, WASH. POST, Dec. 6, 2002, at A45, available at 2002 WL 103574437 (observing that the former president of Indonesia, the largest Muslim country in the world, said Islamic radicalism can be traced to an enormous failure of moderate Islamic leadership); Binyon, supra note 83 (suggesting that Muslim religious leaders, such as muftis, imams, and madrassa scholars, could state that stoning is an outrage).
232 ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 148.
233 Id.
Moderates could also claim a legitimate interest in the community of Muslims and the community's conduct in their reform efforts.234

Nigeria could begin a program to improve and strengthen its own institutions, including the judiciary, particularly at the state level. In reforming judicial institutions, some of the primary activities could be to reduce corruption and increase the efficiency of government services and judicial hearings. In addition, Nigeria could also establish a formal appeals system of Shari'a court decisions at the federal level or throw them out altogether. This proposed new entity, already authorized under the Nigerian constitution, would provide a legitimate means for the government to review Shari'a cases and reduce harsh sentences to a more acceptable level.235 Nigerian lawyers say the federal government has not intervened seriously enough to challenge Shari'a, for instance in cases where Shari'a courts imposed stoning.236

The federal government has not intervened even though actions that are harmful could have been de-legitimized via constitutional arguments or reform-minded interpretation of Islamic texts.237 The record shows that the federal government was complacent when the twelve northern states chose to extend Shari'a and imposed harsh sentences.238 The federal government has also not prevented laws stopping women from riding the same buses as men and ordering women to wear head-to-toe coverings.239 Some Nigerians feel that the federal government does not understand what is occurring in the Shari'a courts.240

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234 Id.
235 di Giovanni, supra note 144; ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, supra note 3, at 250-51. Secular leaders of countries with Muslims have been content to mandate or legislate change from above, sometimes invoking Islam. This has paved the way for those believing in the restoration of Islam to its rightful place in Muslim life and requiring the bridging of the secular gap between religion and society through the implementation of Islamic law. This requires organization and political action in order to persuade, pressure or coerce the political and religious establishments to comply. Id. at 144, 236.
236 Id. at 144, 236.
237 Id. Despite the contrary interpretation of Nigeria's Muslims, the veiling and seclusion of women is not based on the Quran but is rather borrowed from non-Islamic sources. The Quran speaks of women's participation in the life of the community and common religious responsibility with men to worship God, to live virtuous lives, and to cover themselves or dress modestly. Subsequent to these teachings, upper class urban women adopted the veil, and during the early centuries of Islam the separation of women became more common.
238 Id.
239 Id.
240 Id.
But federal government interference with Shari’a could raise tensions in the Muslim community, which might feel that the community’s ability to decide cases is being subverted.241 There may also prove to be cases where there are no loopholes for the appeals court to quash a case on a technicality or reduce a sentence.242

Even though the extension of Shari’a may be unconstitutional, the federal government has not sought to challenge the constitutionality of these laws.243 Pursuant to sections 144 and 145 of the Zamfara State Shari’a Penal Code Law No. 10 of 2000, the State of Zamfara amputated the hand of a convicted cow thief.244 Neither the convict who was amputated nor the federal government has sought to challenge the constitutionality of this law.245 But perhaps a non-governmental organization concerned with civil liberties in Nigeria will have standing to sue, even where the victim has not challenged the constitutionality of the law.246

At a general level, it could be argued that the introduction of Shari’a in any state of Nigeria is constitutional but the expansion of Shari’a to criminal conduct is a concern.247 Unconstitutionality arises only if the law in question expressly prescribes a state religion, contravenes any of the fundamental rights in chapter four of the Constitution, or conflicts with any other aspect of the Constitution.248 Applying this test, the aspect of Zamfara’s penal code that

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241 Oko, supra note 82, at 353. For example, any issue that poses a threat to Islam, however veiled, generates opposition from the Muslim community. Similarly, politicians from the south easily garner support by accusing Muslims of attempting to dominate other religious groups. In the first republic, 1960-66, the political parties used unfounded ethnic accusations to generate support. The Hausa-controlled Nigeria Peoples Congress (NPC) spread rumors that the Action Group (AG), a Yoruba party, would ban Islam. The AG accused the NPC of attempting to force Islam upon the southern part of Nigeria. The National Council of Nigerian Citizens (NCNC), an Ibo-controlled party, was accused by both parties of scheming to stack the federal bureaucracy with Ibos. Such rhetoric and mischievous appeal to the peoples’ fears generated considerable support for the respective parties. Id.

242 Binyon, supra note 83.


244 Id.

245 Id.

246 See id.

247 Id. There is no reason why the State of Zamfara should not be able to introduce Shari’a Laws of Tort or Contract, for example, since these areas fall within the legislative competence of Nigeria’s states. Id. n.223.

248 Id. at 583.
prescribes amputation as punishment for theft is unconstitutional because it violates the language in chapter four that provides that “Every individual is entitled to respect for the dignity of his person, and accordingly... no person shall be subject to torture or to inhuman or degrading treatment.”

Other countries that enjoy good relations with Nigeria might also be able to play a constructive role. First, there could be recognition in places such as the United States that Nigeria is a bulwark of stability in West Africa, requiring a high degree of resources and attention. For instance, the United States could establish an assistance program, targeting the north, to help establish more stable and less corrupt judicial institutions. Another way to assist Nigeria is to help establish a program to improve the Nigerian economy and reduce its debt. By taking these steps, conditions in Nigeria might improve enough to avoid civil war, a return to military rule, or an extension of Shari’a. If either one of the first two alternatives were to happen, Shari’a’s expansion might be irreversible, and Nigeria could become fertile ground for recruiting terrorists. Subsequently, there could be a degeneration and breakup of the entire society, having regional impacts in Western and Northern Africa, as well as global ramifications.

IV. CONCLUSION

Nigeria and India are examples of two societies with a sizeable Muslim population. In this post-9/11 era, it has become more necessary to monitor the legal, political, and social workings of countries that might be incubators of terrorism. As a result, the implications of an expansion of Shari’a could be significant. Governments and judicial institutions may benefit from other countries’ experiences.

249 Id.
250 See Lyman, supra note 29. There also needs to be recognition in Nigeria that U.S. evangelical organizations funneling money to Nigerian Christian organizations are not contributing to religious tension. The United States cannot be viewed as acting against the north’s military and political influence; otherwise its assistance role could be compromised. Id.
251 See id. In the 1990s, the United States closed its diplomatic outposts in northern Nigeria, leaving no U.S. officials to speak Hausa, the local language or implement a diplomatic program. Nigeria’s oil producing region has long been frustrated by the lack of benefits that return to it. Since Nigeria continues to have widespread poverty, disenfranchisement, and sectarian violence, fundamental Islam is viewed as a safe haven and potential solution. Id.
252 See id.
Nigeria may benefit by limiting Shari’a to personal laws similar to the system India has. However, while it may appear that the existence and practice of Shari’a in India does not cause tension, a look below the surface reveals that India’s system of Shari’a brings its own set of controversial issues. Primarily, Shari’a conflicts with the part of the Indian Constitution that guarantees justice, liberty, and equality. Specifically, Muslim women and men are not treated equally in divorce and maintenance proceedings.

India has also chosen to ignore Article 44 of its Constitution, which calls for the establishment of a uniform civil code throughout the country. The government recognizes that imposing this directive would greatly upset India’s Muslim community. This reaction would likely be far worse than the Muslim community’s reaction to the Bano decision. Thus, the Indian government has no intention of removing Shari’a and replacing it with a uniform civil code. For the government, this is not a viable option. Maintaining Shari’a implies the continuing mistreatment of Muslim women under the law. This mistreatment could be eliminated if the Muslim community reformed Shari’a from within rather than the Indian government imposing changes by establishing a national code or through judicial decisions.

Similar to India, Nigeria may have a need to maintain Shari’a over personal laws because the backlash to its removal would be too great. However, opportunities to limit Shari’a to personal laws remain. The federal government could do it but only with strong, active national leadership or judicial interpretation.

Not having a national appeals court to review Shari’a decisions limits the judiciary in Nigeria. However, the judiciary can assert jurisdiction if it sees Shari’a decisions conflicting with the constitution. If changes are judicially imposed, the Muslim community in northern Nigeria may not accept the outcome. As a consequence, it seems that limiting Shari’a to personal laws would have to be accomplished through legislative consensus at the national level. Moderate northern Nigerian Muslim leaders should work with the federal government to produce a compromise where Shari’a remains applicable to personal laws but its non-extension to criminal law is not seen as a defeat of the wishes of the Muslim community.

Nigeria’s issues surrounding the existence and practice of Shari’a are more dramatic and troublesome than India’s, but there are legal and political means to limit the expansion of Shari’a. However, India’s experience shows that even if Shari’a is limited to personal laws, other issues may surface, and Nigeria needs to be cognizant of them. Unlike Nigeria, in India, Shari’a has been codified into the civil code in order to stop any reforms beneficial to
women. The Muslim community was satisfied with this action to maintain the Shari'a status quo in India. India and Nigeria both possess the capability to find the balance between just and constitutional law and the political realities of their multireligious communities.

This Note has proposed several concrete examples of how these nations' leaders can find that balance. India and Nigeria both possess the capability to find the balance between just and constitutional law and the political realities of their multireligious communities. This Note has proposed several concrete examples of how these nations' leaders can find that balance. Unfortunately, there are no signs that the federal government will reform Shari'a in either Nigeria or India. While it is politically difficult to remove Shari'a, it seems possible to halt its expansion or reform it.